

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**BRANDON DAGG, *Applicant***

**vs.**

**SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ9113297  
Oakland District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR RECONSIDERATION AND  
DECISION AFTER RECONSIDERATION**

Applicant Brandon Dagg seeks reconsideration of the April 28, 2022 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant has not met his burden of proof for eligibility for Subsequent Injuries Benefits Trust Fund (SIBTF).

Applicant contends that the WCJ erred in finding that applicant's pre-existing injuries were not labor disabling.

We have not received an answer from SIBTF. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted and returned to the trial level for further development of the record.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. Based on the recommendation of the WCJ and for the reasons discussed below, we grant reconsideration and return this matter to the trial level for further development of the record consistent with this Opinion.

Labor Code<sup>1</sup>, section 4751, provides:

If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and

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<sup>1</sup> All subsequent statutory references are to the Labor Code unless otherwise indicated.

the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combined permanent disability existing after the last injury as provided in this article; provided, that either (a) the previous disability or impairment affected a hand, an arm, a foot, a leg, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member, and such latter permanent disability, when considered alone and without regard to, or adjustment for, the occupation or age of the employee, is equal to 5 percent or more of total, or (b) the permanent disability resulting from the subsequent injury, when considered alone and without regard to or adjustment for the occupation or the age of the employee, is equal to 35 percent or more of total. (§ 4751, Amended by Stats. 1959, Ch. 1034.)

The employee must prove the following elements:

- (1) The combined disability of the preexisting disability and the disability from the subsequent industrial injury must be 70 percent or more; [footnote omitted]
- (2) The combined disability of the two injuries must be greater than that of the disability from the subsequent injury alone; and
- (3) One of the following conditions must be met:
  - (a) The previous disability or impairment must have affected a hand, leg, arm, foot, or eye; the disability from the subsequent injury must affect the opposite and corresponding member; and the disability from the subsequent industrial accident, when considered alone and without regard to or adjustment for the employee's age or occupation, must be equal to 5 percent or more of the total; or
  - (b) The permanent disability resulting from the subsequent industrial injury, when considered alone and without regard to or adjustment for the employee's age or occupation must be equal to 35 percent or more of the total. [Footnote omitted.] (1 CA Law of Employee Injuries & Workers' Comp § 8.09 [1].)

There are no requirements as to the origin of the preexisting disability; it may be congenital, developmental, pathological, or due to either an industrial or nonindustrial accident. (1 CA Law of Employee Injuries & Workers' Comp § 8.09 [1].) The purpose of the statute is to encourage the employment of the disabled as part of a "complete system of workmen's compensation

contemplated by our Constitution.” (*Patterson* (1952) 39 Cal.2d 83 [17 Cal.Comp.Cases 142]; *Ferguson v. Indus. Acc. Comm.* (1958) 50 Cal.2d 469, 475.)

The Supreme Court in *Ferguson* held that the “previous disability or impairment” contemplated by section 4751 “must be actually ‘labor disabling,’ and that such disablement, rather than ‘employer knowledge,’ is the pertinent factor to be considered in determining whether the employee is entitled to subsequent injuries payments under the terms of section 4751.” (*Ferguson, supra*, p. 477; *Escobedo v. Marshall*, 70 Cal.Comp.Cases 604, 619 (Appeals Board en banc).) The court further noted that “the prior injury under most statutes should be one which, if industrial, would be independently capable of supporting an award. It need not, of course, be reflected in actual disability in the form of loss of earnings [as this court has already held in *Smith v. Industrial Acc. Com.* (1955) 44 Cal.2d 364, 367 [2, 3] [288 P.2d 64]], but if it is not, it should at least be of a kind which could ground an award of permanent partial disability. . . .” (*Ferguson*, at p. 477, quoting Larson’s Workmen’s Compensation Law (1952) § 59.33 (vol. 2, p. 63).)

Once the preexisting permanent disability is determined, and the eligibility requirements above are met, the preexisting and subsequent permanent disabilities shall be added to the extent they do no overlap in order to determine the “combined permanent disability” specified in section 4751. (*Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal.Comp.Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc).)

Here, we return this matter to the trial level to further develop the record to determine whether the SIBTF eligibility requirements discussed above are met. (*Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see §§ 5701 and 5906 and *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).) In particular, we return this matter to the trial level to determine whether applicant’s six preexisting conditions: (1) Osgood-Schlatter’s disease, (2) childhood psychological, cognitive and developmental conditions, (3) asthma, (4) GERD, (5) hypertension, and (6) plantar fasciitis, are independently capable of supporting an award of permanent partial disability. If they are, these preexisting conditions are labor disabling for the purposes of SIBTF eligibility and liability.

For the foregoing reasons,

**IT IS ORDERED** that applicant Brandon Dagg's Petition for Reconsideration of the April 28, 2022 Findings and Order is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 28, 2022 Findings and Order is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

**FINDINGS OF FACT**

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4. The issue of SIBTF eligibility is deferred.

**ORDER**

The issue of SIBTF eligibility is deferred.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

I CONCUR,

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**JULY 8, 2022**

**SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

**BRANDON DAGG  
IVANCICH & COSTIS, LLP  
OFFICE OF THE DIRECTOR LEGAL**

**LSM/pc**

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.  
CS